No. 94-530

(2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1994

GAIL S. SHAFFER, Individually and as Secretary of State of the State of New York,

Petitioner,

against

NEW YORK STATE ASSOCIATION OF REALTORS, INC. and CLIFFORD HALL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Question Presented

Whether the court of appeals' ruling that petitioner's nonsolicitation regulation is violative of the First Amendment is consistent with applicable decisions of this Court, where the challenged nonsolicitation regulation restricts concededly truthful and non-misleading communication regarding lawful activity, and where the state officials did not produce a single adjudication that a real estate licensee had committed the offense of blockbusting at any time, the state officials admitted in discovery that they had not evaluated more focused and less restrictive alternatives, and the state officials had not left open ample channels of communication.

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Brief in Opposition to Petition for Writ of Certiorari

Statement of the Case

Respondents brought this lawsuit to challenge so-called nonsolicitation restrictions, which prohibit real estate licensees from initiating any communication with homeowners in designated areas of New York. Under a broadly-defined "solicitation" rubric, state officials have exercised unfettered discretion to preclude truthful and non-misleading communication (both commercial and non-commercial), extending so far as to prohibit a real estate licensee from identifying himself/herself as such, announcing that he/she has opened a new office, or explaining the services that he/she offers (A.1-2).[1] The use of "pennysaver" advertisements is likewise proscribed (A.1).

More than 23 years ago, petitioner's predecessor initiated the practice of imposing nonsolicitation orders as a weapon to combat alleged "blockbusting" (5a). Blockbusting is prohibited under federal statute (42 U.S.C. §3604[b][e][1994]) and state statute (N.Y. Exec. Law §296[3-b][McKinney 1993]) and regulation (19 New York Code of Rules and Regulations ["NYCRR"] §175.17[a]). Those provisions make it illegal for a broker or salesperson to induce or attempt to induce an owner to sell or lease any residential property or to list same for sale or lease by making any representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion or national origin (19 NYCRR §175.17[a]).

[1]References designated A.____ are to the respondent's appendix. References designated ____a are to the petitioner's appendix.

Respondents endorse the prohibitions against pernicious blockbusting conduct. This litigation does not challenge such prohibitions, but, rather, challenges petitioner's sweeping application of restrictions on truthful and non-misleading communication by real estate licensees due to unspecified anecdotal claims that blockbusting has occurred at some time in New York.[2] Petitioner's nonsolicitation orders are content-based prohibitions, which include a ban on truthful and non-misleading statements of a broker's licensee status and willingness to furnish professional services. Moreover, under petitioner's expansive "direct or indirect solicitation" approach, homeowners and brokers are deprived of the opportunity for licensee-initiated communication of valuable information, such as market conditions, mortgage financing and refinancing alternatives, expression of interest by prospective buyers and explanation of services offered, including free appraisal or discount coupons.

This lawsuit is the third challenge by the New York State Association of REALTORS, Inc. ("NYSAR") to nonsolicitation prohibitions by which state officials proscribe licensee-initiated communication with all homeowners in a designated area, instead of allowing individual homeowners to decide whether or not they may be contacted (known as the "cease-and-desist" procedure under N.Y. Real Prop. Law §442-h[3] [McKinney 1994] and 19 NYCRR §175.17[b],[c]) and/or addressing alleged blockbusting conduct, as, when and if it occurs, on a case-by-case basis. In *Matter of Hawley v. Cuomo* (46 N.Y.2d 990, 389 N.E.2d 827, 416 N.Y.S.2d 232 [1979]), the New York Court of

[2]The petitioner has not furnished a single adjudication that any real estate licensee had committed the offense of blockbusting at any time (A.2).

Appeals invalidated county-wide nonsolicitation bans because there was no proof that blockbusting practices were occurring or were imminent. Given the basis of the holding, the *Hawley* court did not reach the claims that state officials lacked legislative authority to impose such orders and that they were unconstitutional in any event. In *Matter of Campagna v. Shaffer* (73 N.Y.2d 237, 536 N.E.2d 368, 538 N.Y.S.2d 933 [1989]), the New York Court of Appeals ruled that there was no legislative authorization for nonsolicitation orders, but again because of its holding, did not reach the claim of their unconstitutionality.

In response to the *Campagna* decision, the petitioner represented to the New York State Legislature that she needed authority to issue nonsolicitation orders to combat alleged blockbusting, despite the fact that she had not adjudicated a single case of blockbusting during the past 10 years[3] (A.2). Acting upon petitioner's (mis)representation of the existence of blockbusting and the need for nonsolicitation orders as a weapon to address the pernicious practice, the Legislature enacted Real Property Law §442-h, which authorized petitioner to establish cease-and-desist prohibitions (under which homeowners individually determine whether to request not to be contacted by a real estate licensee) and nonsolicitation prohibitions (under which the petitioner decides on behalf of all homeowners in a prescribed area to prohibit licensee contact which she deems to be a "solicitation") (7a).

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[3]Recall that in 1979, state officials had no evidence that blockbusting practices were occurring or even imminent (*Matter of Hawley v. Cuomo*, 46 N.Y.2d 990, 992, 389 N.E.2d 827, 828, 416 N.Y.S.2d 232, 233).

In purported compliance with the legislation which she induced, petitioner promptly initiated "rulemaking." By an "emergency rulemaking" she declared the six New York counties of Westchester, Bronx, Kings, Queens, Nassau and Suffolk as cease-and-desist zones.[4] Petitioner also published a notice of proposed rulemaking to designate areas of the counties of Nassau, Queens, Kings and Bronx as non-solicitation areas and scheduled a series of public statement hearings (8a).

As a result of those hearings, petitioner did not initiate a single charge of blockbusting conduct against any of the approximately 145,000 real estate licensees in New York (22a, A.1). No evidence was adduced that market churning or panic selling had occurred (22a).

Nevertheless, nonsolicitation orders were thereafter promulgated (19 N.Y.C.R.R. Part 178). In imposing said orders, the petitioner neither considered the utilization of enhanced disciplinary action against any licensee who engaged in discriminatory conduct nor made any evaluation of the effectiveness of a homeowner directed cease-and-desist procedure (24a).

The district court considered generalized anecdotal evidence of blockbusting to be sufficient to support the non-solicitation prohibitions (52a). The district court converted the analysis of constitutionality into a question of whether the respondents had conclusively established that the practice of blockbusting no longer exists (51a).

[4]The absence of an "emergency" was effectively demonstrated by the petitioner's conduct thereafter: no cease-and-desist lists were issued until the summer of 1990, and then lists were only issued for the four counties of Bronx, Kings, Queens and Nassau.

The Court of Appeals for the Second Circuit reversed the district court, applying this Court's decisions regarding restrictions on commercial speech and ruling that the petitioner did not establish a "reasonable fit" between legitimate interests and the means chosen to serve those interests (23a). The New York Court of Appeals had previously criticized the state officials' failure to consider whether the cease-and-desist program was adequate, or to consider enhanced disciplinary action which would punish only those who were engaging in or demonstrating an intent to engage in invidious blockbusting activity (*Matter of Campagna v. Shaffer*, 73 N.Y.2d 237, 245, 536 N.E.2d 368, 371, 533 N.Y.S.2d 933, 936). Similarly, the Second Circuit recognized that the petitioner had not considered whether there were less restrictive means for effectively combating blockbusting (24a). Also criticized was the petitioner's failure to offer licensees effective alternatives for communication (24a).

Summary of Argument

The petitioner has violated fundamental rights of real estate licensees and homeowners by imposing sweeping nonsolicitation prohibitions on truthful and non-misleading communications regarding lawful activity. As a result, licensees are prohibited from introducing themselves as such and advertising the existence of their offices and the services they offer, as well as communicating an array of useful information to homeowners regarding housing inquiries, market values and mortgage financing opportunities.

Petitioner's purported justification for these prohibitions on licensee-initiated communications is blockbusting, which is a pernicious practice which has not been shown to be currently afflicting New York and which does not warrant the wholesale abridgement of First Amendment rights of licensees and homeowners in the areas petitioner designates as nonsolicitation areas. Petitioner's hyperbole to both the State Legislature and the courts, claiming a need for nonsolicitation orders to combat blockbusting and its frenzied market activity, is utterly unsupported, and indeed refuted, on the record. Instead, what appears is the political expedient of catering to neighborhoods which seek to control the availability of housing information in order to insulate themselves against ordinary and lawful transition occasioned by minority home seekers and minority brokers.

Immediately upon the New York Court of Appeals decision in *Matter of Campagna v. Shaffer* (73 N.Y.2d 237, 536 N.E.2d 368, 538 N.Y.S.2d 933), the petitioner proclaimed the need for nonsolicitation orders to combat blockbusting, despite the absence of any adjudicated cases thereof in the

preceding ten years. As a result of the hearings conducted to "justify" the issuance of nonsolicitation orders, the petitioner did not initiate a single charge of alleged blockbusting against any real estate licensee. The legislation the petitioner induced and the regulation the petitioner promulgated swept past the absence of an actual blockbusting problem and transmuted vocalized complaints regarding the volume of contacts by various real estate licensees into a "reason" to prohibit concededly truthful and non-misleading communication regarding lawful activity by all real estate licensees, which is recognized as completely proper throughout New York, except where the petitioner imposed a nonsolicitation order.

Discovery in this matter established that petitioner had not considered the more focused and less restrictive alternatives of homeowner activated cease-and-desist restrictions or enhanced disciplinary enforcement against any perpetrators, if, as, and when blockbusting conduct occurs.

The consequence of nonsolicitation restrictions is a violation of the free speech rights of real estate licensees, as well as homeowners and home seekers wishing to reside in nonsolicitation areas.

The petitioner's claim of a need for further delineation of this Court's ruling in *Board of Trustees of the State University of New York v. Fox* (492 U.S. 469 [1989]) is specious. The Second Circuit simply applied this Court's prior rulings to the record. Settled constitutional principles were controlling.

REASONS FOR DENYING THE PETITION

I. Settled First Amendment Principles Are Controlling

The Second Circuit addressed the narrow issue of whether the challenged regulation promulgated by the petitioner pursuant to statutory authority was a valid governmental restriction on speech (13a). Applying the settled principles of *Central Hudson Gas & Electric Corp. v. Public Service Commission* (447 U.S. 557 [1980]) and *Board of Trustees of the State University of New York v. Fox* (492 U.S. 469 [1989]), the court of appeals found that the petitioner did not establish a reasonable fit between legitimate interests and the means chosen to serve those interests (24a). "Particularly troubling in this case is the Secretary's failure to determine empirically whether less restrictive measures, such as the implementation of cease-and-desist orders, would provide an alternative means for effectively combating the level of blockbusting evidenced by the record in this case" (24a).

In her Petition for a Writ of Certiorari, the petitioner makes the fallacious claim that the Second Circuit has departed from decisions of this Court by "effectively requiring the State to demonstrate that the restriction chosen is the least severe that will achieve the desired end, notwithstanding evidence, based on experience, that cease-and-desist orders were an insufficient alternative" (Petition for Writ of Certiorari, Question Presented, p. i). Petitioner further objects to the court of appeals' purported failure "to afford due deference to the Secretary and to her implicit finding that existing cease-and-desist orders, the only practical alternative to her, were not effective to combat continued

blockbusting activities" (Petition, Reasons For Granting the Petition, p.20-21).

This ignores the finding by the court of appeals that "[t]he Secretary . . . offer[ed] no evidence of any kind that . . . [the] narrower, resident activated [cease-and-desist measure] . . . is an ineffective means for combating the individual incidents of blockbusting alleged by residents at the public hearings" (24a). It also ignores the fact that, in discovery, the Secretary admitted she could not answer why the utilization of the cease-and-desist procedure was not enough to address the problems the Secretary perceived (24a, A.2).

This Court's decision in *City of Cincinnati v. Discovery Network, Inc.* (____ U.S. ____, 113 S. Ct. 1505 [1993]) is dispositive of the unconstitutionality of the challenged restrictions. This Court struck down a regulation of speech, noting that the government seriously underestimated the value of commercial speech (*City of Cincinnati v. Discovery Network, Inc.*, ____ U.S. ____, 113 S. Ct. 1505, 1511) and failed to meet its burden of establishing a "reasonable fit" between the legislature's ends and the means chosen to accomplish those ends (____ U.S. ____, 113 S. Ct. 1505, 1510). Significantly, it was noted that the existence of less burdensome alternatives to the restrictions on commercial speech is certainly a relevant consideration in determining whether the fit between ends and means is reasonable (____ U.S. ____, 113 S. Ct. 1505, 1510, n.13).

Here, the petitioner has not considered relying upon homeowner initiated cease-and-desist restrictions or upon enhanced disciplinary measures against any individuals who commit blockbusting, instead of imposing nonsolicitation

restrictions on *all* licensees. Instead, the nonsolicitation regulation at issue allows petitioner to adopt the shorthand expedient of banning all real estate licensee-initiated communication. It fails to distinguish between (i) truthful and non-misleading communication regarding lawful activity and (ii) impermissible blockbusting solicitations, if, as and when they occur. Petitioner is allowed to treat what she deems to be "excessive" solicitation (irrespective of its truthful and non-misleading content) as proscribable blockbusting solicitations (19 NYCRR §175.17[a]). Her view of "too much volume" is transmuted into a finding of collective impropriety, which conveniently ignores the actual content of a licensee's speech and the importance to residents of information related to sales activity.

This purported tour de force is "accomplished" by coupling a claimed perception of "intense and repeated solicitations" (i.e. a disfavored aggregate volume of licensee contacts) with another claimed perception, "that such solicitations have caused homeowners to reasonably believe that property values may decrease because persons of a different race, ethnic, social or religious background are moving or are about to move into the neighborhood or geographic area" (N.Y. Real Prop. Law §442-h[2][a]). Yet the record assembled by petitioner fails to establish evidence that homeowners believed that "different persons" were moving in, that property values might decrease as a consequence, or that such a belief was reasonable. Indeed, the petitioner admittedly did not inquire into the reasonableness of the claimed belief of homeowners (A.2). Instead, without finding even a single improper comment by any real estate licensee, *all* licensee-initiated communication was irrebuttably presumed to be (tantamount to) blockbusting. This is the predictable effect of a regulatory scheme which

studiously omits consideration of the actual content of any licensee's communication (for which the licensee is directly accountable).

This Court has recognized the basic constitutional defect in a governmental attempt to suppress the free flow of truthful and non-misleading information because it fears that otherwise homeowners may make a decision which the government views as inimical to the homeowner's self-interest and the corporate interest of the government: they may choose to leave town. This Court in *Linmark Associates, Inc. v. Township of Willingboro* (431 U.S. 85 [1977]), stated "it is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." (*Linmark Associates*, 431 U.S. 85, 97, *quoting Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 [1976]).

Would-be regulators have the obligation of distinguishing the harmless from the harmful, the truthful from the false and the helpful from the misleading (*Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480, and *Shapero v. Kentucky State Bar Assn.*, 486 U.S. 466, 478 [1988], *citing Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 646 [1985]). The shorthand expedient of banning all solicitation once petitioner feels there is too much solicitation is an unconstitutional failure to distinguish protected truthful and non-misleading communication and to punish only pernicious blockbusting.

The petitioner's nonsolicitation program is simply content-based discrimination which is not reasonably necessary

to achieve a compelling state interest (*Central Hudson Gas & Elec. Corp. v. Public Service Commission*, 447 U.S. 557, 564; *R.A.V. v. City of St. Paul, Minn.*, ____ U.S. ____, 112 S.Ct. 2538 [1992]). Indeed, petitioner's attempt to silence real estate licensees in this matter is particularly ironic, in view of the *R.A.V.* decision. There, an ordinance designed to proscribe hate speech was found facially invalid under the First Amendment. Here, respondents seek only the right to truthful and non-misleading communication with homeowners in order to implement their fair housing obligations under federal and state law.

On this factual record, it is plain that the petitioner has not narrowly tailored her restrictions to combat pernicious blockbusting, or seriously considered the utilization of more focused and less restrictive alternatives, or left open ample channels of communication (*City of Cincinnati v. Discovery Network, Inc.*, ____ U.S. ____, 113 S. Ct. 1505, 1516). Instead, she remits real estate licensees to only advertising in newspapers of general circulation, which are an ineffective and costly means (1) of obtaining new listings to match the preferences of buyer clients and customers and (2) of communicating with potential sellers regarding the interests of prospective purchasers. Moreover, general newspaper advertising is not a suitable alternative to otherwise lawful methods of practicing real estate (which are utilized throughout the State of New York) by which brokers develop name recognition and a deserved reputation for furnishing reliable information, without necessarily seeking a current listing. Petitioner concedes that she prohibits utilization of community newspaper advertising, commonly known as pennysavers (A.1). The Second Circuit appropriately recognized that the regulatory scheme failed to offer real estate licensees a cost effective alternative (24a).

In the final analysis, the petitioner seeks to abridge First Amendment rights of residents and real estate licensees upon mere *ipse dixit*. Petitioner's claim that blockbusting techniques may be subtle or not otherwise necessarily amenable to prosecution is disingenuous. In 1979, the New York Court of Appeals found that blockbusting practices were not even imminent (*Matter of Hawley v. Cuomo*, 46 N.Y.2d 990, 992, 389 N.E.2d 827, 828, 416 N.Y.S.2d 232, 233). The petitioner has not adjudicated a single case of blockbusting since then. Nor has she offered a shred of probative evidence, by affidavit or otherwise, that insidious but subtle blockbusting has been occurring. Instead, petitioner simply seeks to remove the future possibility of blockbusting by imposing a blanket gag order, based upon unspecified anecdotal claims.

The petitioner never evaluated the efficacy of her cease-and-desist approach to deal with any problems of licensee-initiated communication. Nor did she consider focusing on any perpetrators of blockbusting when, as and if such conduct is alleged to occur, utilizing enhanced disciplinary sanctions against those found to be guilty, rather than presuming that all licensee-initiated communication is pernicious. The First Amendment's protection of truthful and non-misleading speech in no way impairs the petitioner's ability to identify, punish and eradicate blockbusting conduct, if it arises. The petitioner has failed to meet the burden of justifying her restrictions (*Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480).

Conclusion

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated: October 18, 1994

Respectfully submitted,

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APPENDIX

Excerpts from Docket No. 31 - "Marked" copy of Plaintiff's Rule 3(g) statement (Second Circuit J.A. 490-550).

50. The defendant did not initiate any charges of alleged blockbusting against any real estate licensee as a result of the hearings held on her proposed non-solicitation orders.
Admitted.

55. In discovery, the defendant admitted that she made no statistical comparison of the real estate market activity in the initially proposed areas and the areas she ultimately designated as non-solicitation areas.
Admitted.

63. In discovery, the defendant admitted that she applies the non-solicitation prohibition to "little local community newspaper advertising," commonly known as "pennysavers."
Admitted.

70. In discovery, the defendant admitted that she pursues disciplinary sanctions against a real estate licensee who sends a letter that merely announces that he just opened an office in the vicinity.
Admitted.

71. In discovery, the defendant admitted that she pursues disciplinary sanctions against real estate licensees who truthfully and accurately communicate their business services to a homeowner located in a non-solicitation area.
Admitted.

83. In discovery, the defendant admitted that she made no investigation into the reasonableness of the claimed beliefs of homeowners.
Admitted.

86. In discovery, defendant did not produce a single adjudication of a real estate licensee having committed the offense of blockbusting (19 NYCRR §175.17[a]) at any time.
Admitted.

88. In discovery, defendant admitted that non-solicitation restrictions prohibit a real estate licensee from identifying himself/herself as such and accurately stating that he/she has just opened a new real estate office.
Admitted.

89. In discovery, defendant admitted that the aforesaid truthful and non-misleading statement (¶88) is prohibited in a non-solicitation area, but would be completely proper conduct throughout New York other than in a non-solicitation area.
Admitted.

91. In discovery, defendant admitted that she could not answer why the utilization of the cease and desist procedure wasn't enough to address the problems the defendant perceived.
Admitted.

94. Non-solicitation orders prohibit truthful and non-misleading communication by real estate licensees to homeowners.
Admitted.

101. As the defendant had previously declared as "cease and desist" zones all of the counties where she later imposed non-solicitation orders as well, homeowners who did not want to receive licensee initiated communication could make their own decision to prohibit contact through use of defendant's cease and desist procedure.
Admitted.